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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS W. SPINDLE
SPECIALIST, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

I

WHETHER THE CONFRONTATION CLAUSE REQUIRES EXCLUSION OF THE PRIOR RECORDED BUT "PRESUMPTIVELY UNRELIABLE" TESTIMONY OF AN ACCOMPLICE, WHERE AN ACCUSED HAS HAD NO OPPORTUNITY TO CROSS-EXAMINE THE ACCOMPLICE CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE TESTIMONY WAS RENDERED.

II

WHETHER PRIOR RECORDED TESTIMONY OF AN ACCOMPLICE IS AUTOMATICALLY ADMISSIBLE AS AN EXCEPTION TO THE CONFRONTATION CLAUSE WHERE THE ACCOMPLICE (1) HAD MADE NUMEROUS INCONSISTENT STATEMENTS; (2) HAD A MOTIVE TO POINT THE FINGER OF CULPABILITY TO OTHERS; AND (3) IS UNAVAILABLE FOR CROSS-EXAMINATION CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE TESTIMONY WAS RENDERED.

III

WHETHER ADMISSION OF THE SELF-SERVING, CONTRADICTORY, AND "PRESUMPTIVELY UNRELIABLE" PRIOR RECORDED TESTIMONY OF AN ACCOMPLICE, AND THE INABILITY OF PETITIONER TO CROSS-EXAMINE THE ACCOMPLICE CONCERNING EVIDENCE DISCOVERED AFTER THE TESTIMONY WAS RENDERED, VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS.

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No.

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v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The Petitioner, Thomas W. Spindle, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The Court of Military Appeals affirmed the decision of the Army Court of Military Review by decision dated March 10, 1989. The opinion of the Court of Military Appeals appears at 28 M.J. 35 (C.M.A. 1989) (Appendix A). Petitioner timely filed a motion for reconsideration with the Court of Military Appeals. On May 9, 1989, the Court denied the motion for reconsideration (Appendix B). The opinion of the Army Court of Military Review was unpublished (Appendix C).

JURISDICTION

On May 9, 1989, the Court of Military Appeals denied petitioner's timely motion for reconsideration of that court's

March 10, 1989, decision affirming petitioner's conviction and the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

Statement of the Case

Contrary to his pleas, petitioner was convicted by a general court-martial of assault with intent to commit sodomy, felony murder, attempted sodomy, and indecent acts with a minor.[1] The Army Court of Military Review dismissed petitioner's conviction for assault with intent to commit sodomy as multiplicious with his conviction for attempted sodomy (Appendix C). The pertinent issues granted by the United States Court of Military Appeals, as a prerequisite to this Court's jurisdiction, were as follows:

I.

WHETHER THE EVIDENCE OF RECORD IS INSUFFICENT AS A MATTER OF LAW TO SUPPORT THE FINDINGS OF GUILTY.

II

WHETHER APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT THE PRIMARY WITNESS AGAINST HIM.

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[1] These offenses constitute violations of Uniform Code of Military Justice arts. 134, 118, 80, 10 U.S.C. §§ 934, 918, 880 (1982).

III

WHETHER THE MILITARY JUDGE ERRED BY REFUSING TO ALLOW THE DEFENSE TO PRESENT EXTRINSIC EVIDENCE RELEVANT TO THE CREDIBILITY OF PRIVATE COURTNEY, THE CHIEF WITNESS AGAINST PETITIONER.

Over four years after petitioner filed pleadings with the Court of Military Appeals, that Court issued its opinion affirming appellant's conviction and the sentence (Appendix A).

Statement of Facts

A. Background.

Petitioner's coaccused, Private Clifford B. Hubbard, was tried separately. The prosecution's primary witness was Private Joseph H. Courtney, who implicated Hubbard and petitioner in the alleged murder and attempted sodomy of a teenaged boy. Courtney, who had made numerous inconsistent statements either denying knowledge of the offense or implicating others, testified at petitioner's pretrial investigation. He fled prior to petitioner's trial, but resurfaced thereafter.

The deceased was Derek Kusumoto (Prosecution Exhibit 32), a teenager who suffered from severe asthma (R. 382-83). His body was found on February 6, 1982, face down, at the bottom of a flight of steps leading into a bunker (Prosecution Exhibit 7). The deceased had a human bitemark on his chest above his left nipple (R. 532-33, 910-11).

Lieutenant Colonel Larry O'Neil was a dentist and forensic odontologist who examined the bitemark on the deceased's chest (R. 910-37). Courtney and a close friend, Private Joseph C. Hanson, fled prior to Dr. O'Neil's determination that the bitemark was made within two hours prior to death, and that someone other than petitioner, Hubbard, or Courtney had made the bitemark (R. 916-18, 930). Additionally, Mr. Phillip

Mills, a laboratory technician for the Criminal Investigation Command, also testified that the blood type of the saliva found in the bitemark eliminated petitioner as the person who bit the decedent. Courtney had sworn at a pretrial investigation that only he, Hubbard, and petitioner had been present at the time of death. No teeth imprints, however, were made of Hanson prior to trial.

Petitioner found the body of the deceased. A medical examiner subsequently determined that the deceased died of asphyxiation (R. 520). Investigators focused suspicion on petitioner because he had stated that the boy was wearing striped socks (R. 564, 848, 853-54). When investigators found the body, the socks were rolled down so that the stripes on the socks were not exposed (R. 645, 853-54; Prosecution Exhibit 7). Only two hairs discovered on the deceased's clothing, however, were somewhat consistent with petitioner's hair (R. 617-20, 622, 626-27).

B. Testimony of Courtney at the Pretrial Investigation.[2]

In all, Courtney made seven pretrial statements, but never admitted involvement in the deceased's death, except to confess to being an accessory after the fact in hiding the body (R. 750, 815-17). He alternatively (1) denied any knowledge of the offense; or (2) claimed to have heard screams of a youth in the shadows with petitioner and Hubbard; or (3) claimed to have witnessed the sodomy and death of the victim before helping dispose of the body. The medical examiner, however, found no trauma or sperm in or about the deceased's anus (R. 529), and no dirt in the nose or mouth of the deceased (R. 534).

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[2] In the military justice system, a pretrial investigation is mandatory for "general" courts-martial. Only "general" courts-martial can impose confinement in excess of six months, forfeitures in excess of two-thirds pay per month for six months, or a dishonorable discharge. *See* Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 601(d)(2).

On March 16, 1982, Courtney testified under oath at a pretrial investigation hearing that he had not gone near the crime scene on the night of the death (R. 715). He indicated that he had been in his quarters sleeping from 10 p.m. until 4 a.m. the following morning (R. 722). On March 18, 1982, again at the pretrial investigation, Courtney developed yet another version of events. Courtney stated that he took no part in the death of the deceased, but assisted in moving the body to the bunker. Courtney also stated that Hubbard and petitioner wrestled with the deceased, and pulled down the deceased's pants (R. 737, 763, 795-98). Courtney also indicated that when he tried to interfere Hubbard knocked him down (R. 740, 809-10). Courtney swore that Hubbard attempted anal intercourse with the deceased, while petitioner muffled the deceased's screams with his hands (R. 739, 745-46, 764). Courtney also testified that after the deceased went into a seizure, he took the deceased's pulse, and determined him to be dead (R. 748-49, 814-15).

Courtney freely admitted he had given several different statements to investigators concerning the events surrounding the decedent's death (R. 755-57). Furthermore, he stated that he had "no reason" for concocting his various stories (R. 755-56). Courtney, however, fled prior to trial. Therefore, neither petitioner nor Hubbard had the opportunity to cross-examine Courtney in front of the jurors regarding the inconsistent statements as well as the bitemark evidence which came to light shortly before trial.

C. Litigation of the Confrontation Issue at Trial.

When Courtney's absence at the time of trial became evident, the Government sought to admit Courtney's pretrial hearing testimony based on the inference of reliability of testimony coming within a "firmly rooted hearsay exception." Petitioner objected to admission of the prior statements, arguing that testimony at a military pretrial investigation does not fall within a firmly rooted hearsay exception. Petitioner also contested the Government's position that Courtney was

not reasonably available. Finally petitioner argued that admission of the pretrial statement of Courtney violated his sixth amendment right of confrontation.

The military judge denied petitioner's confrontation motion, and permitted the Government to read the March 16 and 18, 1982 statements of Courtney to the jury. The military judge did not admit written prior nconsistent statements, which were part of the seven pretrial statements made by Courtney and which the defense sought to admit to impeach the pretrial hearing testimony admitted by the judge. The military judge also refused to allow petitioner to introduce evidence that Courtney had stolen money from another soldier just prior to disappearing. Petitioner presented Lieutenant Colonel O'Neil's testimony regarding the bitemark evidence on the merits, but had no opportunity to cross-examine Courtney thereon.

D. Decisions Below.

Both the Army Court of Military Review and the Court of Military Appeals held that testimony given at a military pretrial investigation under oath and subject to cross-examination is admissible "without more" because it falls within a firmly rooted hearsay exception. Furthermore, the Court of Military Appeals, by reference to its decision in Hubbard's case, held that "factual reliability does not have to be established." *United States v. Spindle*, 28 M.J. 35, 36 (C.M.A. 1989) (Appendix A) (comparing petitioner's case with *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989)). Petitioner moved for reconsideration of the court's decision, arguing that *Ohio v. Roberts*, 448 U.S. 56 (1980), created only a rebuttable inference that prior recorded testimony bears indicia of reliability. Petitioner argued that in cases such as his, where the prior recorded testimony is that of an admitted accomplice, factual reliability must be established. The Court of Military Appeals denied the motion for reconsideration.

QUESTIONS PRESENTED

I

WHETHER THE CONFRONTATION CLAUSE REQUIRES EXCLUSION OF THE PRIOR RECORDED BUT "PRESUMPTIVELY UNRELIABLE" TESTIMONY OF AN ACCOMPLICE, WHERE AN ACCUSED HAS HAD NO OPPORTUNITY TO CROSS-EXAMINE THE ACCOMPLICE CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE TESTIMONY WAS RENDERED.

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REASONS FOR GRANTING THE WRIT

I. WHERE AN ACCUSED IS DENIED THE OPPORTUNITY TO EFFECTIVELY CROSS-EXAMINE A DECLARANT, WHO WAS AN ACCOMPLICE, CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE ACCOMPLICE HAS FLED, THE GENERAL RULE OF ADMISSIBILITY OF PRIOR RECORDED TESTIMONY SHOULD NOT APPLY.

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), Justice Powell recognized two exceptions to the general rule that the admission of prior recorded testimony of an unavailable declarant does not violate the sixth amendment. *Id.* at 54 n.10. In particular, Justice Powell recognized a "Confrontation Clause infringement" under two scenarios: (1) where the prosecution withholds relevant discoverable evidence; and (2) where there is a specific statutory or court-imposed limit on the scope or nature of defense counsel's cross-examination.[3] Petitioner requests grant of review of the issue of whether the confrontation clause bars admission of prior recorded testimony in a third scenario: *where an accused has no opportunity to effectively cross-examine an accomplice concerning new, significant, and exculpatory evidence discovered after the rendering of that witness' prior testimony.*

Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, and Rule 33 of the Federal Rules of Criminal Procedure (new trial petitions), stand for the proposition that a criminal accused must have access to all relevant evidence for there to be due process. When the Government denies the accused access to discoverable evidence as in *Brady*, or where new evi-

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[3] Footnote ten of Justice Powell's opinion in *Pennsylvania v. Ritchie* lists cases supporting this latter proposition (citing, *inter alia*, Delaware v. Van Arsdall, 475 U.S. 673 (1986) (denial of right to cross-examine to show bias); Chambers v. Mississippi, 410 U.S. 484 (1973) (denial of right to impeach own witness); Douglas v. Alabama, 380 U.S. 415 (1965) (denial of right to cross-examine codefendant)).

dence arises subsequent to trial, the result is the same—an accused may be entitled to a new trial. In either case, the accused may demonstrate that the lack of relevant evidence denied him the opportunity to *effectively* cross-examine the witness against him and "to delve into the witness' story to test the witness' perceptions and memory [and] . . . to impeach, *i.e.*, discredit the witness." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

As pointed out by Justice Blackmun, in his criticism of the plurality decision in *Pennsylvania v. Ritchie*, "confrontation" under the sixth amendment means more than the "empty formality" of a mere opportunity to cross-examine witnesses; "confrontation" means *effective* cross-examination which "call[s] into question a witness' credibility." *Pennsylvania v. Ritchie*, 480 U.S. at 62 (Blackmun, J., concurring in part and concurring in the judgment). Thus, Justice Blackmun joined in the plurality decision in *Pennsylvania v. Ritchie* remanding the case to determine whether Ritchie had been improperly denied access to a witness' medical treatment records which contained "information that may have changed the outcome of his trial had it been disclosed." *Pennsylvania v. Ritchie*, 480 U.S. at 61.

In petitioner's case, counsel for the defense could not *effectively* cross-examine Courtney without the knowledge that someone other than petitioner, Hubbard, or Courtney had inflicted the bitemark on the deceased.[4] Cross-examination in light of that evidence was essential to delve into Courtney's story, to test his perceptions and memory, to discredit his credibility, and, most importantly, to discredit Courtney's implication of petitioner. *See Davis v. Alaska*, 415 U.S. 308 (1974). In order for there to have been *effective* cross-examination of Courtney, petitioner required the opportunity

[4] While petitioner does not allege bad faith on the part of the Government in frustrating his right to face-to-face confrontation of Courtney regarding the bitemark evidence, the Government was (1) responsible for the timely investigation of the bitemark evidence; and (2) responsible for the failure to place restrictions on Courtney's freedom of movement prior to trial.

to ask Courtney who had inflicted the bitemark on the deceased, and why Courtney sought to deceive regarding the events in question. As pointed out by Justice Brennan, in *Lee v. Illinois*, 476 U.S. 530, 545 (1986), "a codefendant's confession is *presumptively unreliable* as to the passages detailing the defendant's conduct or culpability because those *passages may be the product of a codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another*" (emphasis added).[5]

As this issue is one of constitutional dimension, it cannot be said that the absence of the opportunity to confront and cross-examine Courtney concerning the subsequently discovered bitemark evidence was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967); *see also Lee v. Illinois*, 476 U.S. at 547 (citing *Schneble v. Florida*, 405 U.S. 427 (1972)).

II. A GRANT OF REVIEW IS NECESSARY TO RESOLVE WHETHER THE RELIABILITY PRONG OF *OHIO V. ROBERTS* MUST BE SATISFIED WHEN THE PRIOR RECORDED TESTIMONY OF AN UNAVAILABLE ACCOMPLICE IS OFFERED OVER DEFENSE OBJECTION.

III. ADMISSION OF THE PRIOR TESTIMONY OF AN ACCOMPLICE, UNDER THE CIRCUMSTANCES OF PETITIONER'S CASE, VIOLATED PETITIONER'S RIGHT TO DUE TO PROCESS.

In *Bourjaily v. United States*, 483 U.S. 171 (1987), this Court held that "indicia of reliability"[6] need not be shown for coconspirator statements, made in the course of a conspiracy, in order for such statements to be admissible. *Id.* at 183-84. Citing *Bourjaily*, the Court of Military Appeals held that

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[5] Similarly, Justice Marshall in his dissent to Dutton v. Evans, noted that accomplice statements are so inherently prejudicial that cross-examination is a minimal requirement. Justices Black, Douglas, and Brennan joined Justice Marshall in the dissent in Dutton v. Evans, 400 U.S. 74, 110 (1970).

[6] *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

"factual reliability does not have to be established as a prerequisite for admitting hearsay evidence pursuant to well-recognized hearsay exceptions." *United States v. Hubbard*, 28 M.J. 27, 33 (C.M.A. 1989). Thus, the Court of Military Appeals upheld the admission of Courtney's presumptively unreliable accomplice testimony merely because it was prior recorded testimony. *See Lee v. Illinois*, 476 U.S. at 530 (1986).

Ohio v. Roberts, 448 U.S. 56 (1988) created only a *rebuttable inference* of reliability for hearsay that falls into a recognized hearsay exception. Accordingly, petitioner requests that this Court grant review to determine whether the reliability prong of *Ohio v. Roberts* is applicable to prior recorded testimony of an accomplice whose incriminating declaration is not made in the furtherance of the conspiracy. *See generally Lee v. Illinois*, 476 U.S. at 530.[7]

While petitioner acknowledges that reliability *may* be inferred where a prior recorded statement is subject to effective cross-examination, an accused *may* rebut the inference of reliability of "presumptively unreliable" accomplice testimony. *See Id.* Furthermore, the issue is not merely whether Courtney's sworn statement, in general, is reliable. The issue is whether Courtney's testimony "could not be trusted as regards [*petitioner's*] participation in the [murder]." *Id.* at 544. Reliability may be inferred, but should not automatically be inferred, where prior recorded testimony is that of a presumptively unreliable accomplice who is no longer subject to cross-examination concerning his prior inconsistent statements or newly discovered evidence.

Petitioner has been denied the right to effectively confront Courtney "face-to-face" at trial, and has been frustrated in his attempt to demonstrate that the "inference" of reliability of

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[7] *See generally* Bourjaily v. United States, 483 U.S. at 182 ("[W]hen the hearsay statement is the out-of-court declaration of a co-conspirator [made during the course of a conspiracy] . . . we conclude that the second inquiry [of *Ohio v. Roberts*], independent indicia of reliability, is also not mandated by the Constitution.")

Courtney's accomplice testimony should not apply. *See generally Coy v. Iowa,* 108 S.Ct. 2798 (1988). Furthermore, the denial of confrontation has precluded petitioner from the exercise of effective cross-examination of Courtney, who was the Government's key witness tying petitioner to the crime. The military judge erred to petitioner's prejudice by trying petitioner without the presence of Courtney.

Petitioner suffered a denial of his right to confront and effectively cross-examine Courtney—before the fact finder—regarding Courtney's sworn prior inconsistent statements. As pointed out in *Coy v. Iowa,* the accuser should meet the accused face-to-face and "*the trier of fact will draw its own conclusions.*" *Id.* at 2802 (emphasis added). It is essential that the defendant be afforded " 'a right to *meet face to face* all those who appear and give evidence *at trial.*' " *Id.* at 2803 (citing *California v. Green,* 399 U.S. 149, 175 (1970) (Harlan, J., concurring)) (emphasis in original).

The denial of the sixth amendment right to face-to-face confrontation of Courtney, "*at trial,*" regarding the bitemark evidence and Courtney's prior inconsistent statements, constitutes a fifth amendment due process violation. The Government has provided the fact finder presumptively unreliable accomplice testimony, and sanctioned its use as presumptively reliable since the "opportunity" to cross-examine existed at the pretrial investigation. The rulings of the trial judge vitiated petitioner's fifth and sixth amendment right to have the fact finder see "[t]he profound effect upon [Courtney] of standing in the presence of the person [he] accused." *Id.* at 2802. Thus petitioner is entitled to a new trial, and to face-to-face confrontation with Courtney.

The error of the trial judge in admitting the recorded, presumptively unreliable, accomplice testimony of Courtney, in the absence of proof of reliability, is not harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. at 18 (1967).

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CONCLUSION

A grant of review of petitioner's case offers this Court the opportunity to address the limits of the "firmly rooted hearsay" exception set out in *Ohio v. Roberts* in the context of accomplice testimony. Furthermore, the issues presented offer the Court a unique opportunity to address the question of whether a defendant may be denied the effective right to cross-examination by the inability to cross-examine an accomplice regarding evidence which is discovered after the declarant becomes unavailable. Under the circumstances of petitioner's case, this Court may squarely face the issue of whether there is a *per se* rule of admissibility for any prior recorded testimony, including presumptively unreliable accomplice testimony, so long as it is subject to cross-examination to some minimal degree.

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APPENDIX A

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UNITED STATES COURT OF MILITARY APPEALS

No. 51,123
CM 443294.

UNITED STATES, APPELLEE,

v.

SPECIALIST FOUR THOMAS W. SPINDLE, U.S. ARMY,
APPELLANT

March 10, 1989

For Appellant: *Lieutenant Colonel Arthur L. Hunt, Major Stephen R. Dooley, Captain David L. Carrier* (on brief).

For Appellee: *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Lieutenant Colonel Gary F. Roberson, Captain Patrick J. Cunningham, Captain Erik M. Stumpfel* (on brief); *Lieutenant Colonel Thomas M. Curtis.*

Opinion of the Court

EVERETT, Chief Judge:

A general court-martial composed of officers tried appellant on charges identical with those on which his co-accused was tried a few days later. *See United States v. Hubbard*, 28 MJ 27 (CMA 1989).[1] The Government's evidence in the two cases was almost identical – except that, unlike Hubbard, Spindle had made some incriminating admissions which were received in evidence at his trial. The findings

[1] Charge I alleged premeditated murder and felony murder in separate specifications; Charge II alleged sodomy; and the Additional Charge alleged committing indecent acts, in violation of Articles 118, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 918, 925, and 934, respectively. The accused was convicted under Charge II of attempted sodomy, which is a violation of Article 80, UCMJ, 10 USC § 880.

made by each court-martial were to the effect that the accused had murdered Derek K during an attempt to commit sodomy and also had committed attempted sodomy and indecent acts against the victim. Spindle was also convicted of assault with intent to commit sodomy.[2] Not surprisingly, the issues raised in this Court by Spindle and the arguments in support thereof parallel to a considerable extent those raised by Hubbard; and we reach a result here similar to that arrived at in Hubbard's case.

I

Appellant's principal contention is that the former testimony of an alleged eyewitness, Joseph Courtney, should not have been received, because to do so violated Mil.R.Evid. 804(b)(1), Manual for Courts-Martial, United States, 1969 (Revised edition), and the Sixth Amendment. However, we conclude that the prosecution offered evidence which adequately supported the military judge's determination "that the Government has made all reasonable efforts to obtain the presence of Private Joseph Courtney, and that he is, in fact, unavailable at" the time of Spindle's trial. Indeed, the evidence leaves no doubt that prosecutorial authorities made the requisite "good-faith effort to obtain [Courtney's] presence at trial." *See Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

Once Courtney's unavailability had been established, the court-martial was entitled to consider his testimony, which had been recorded verbatim at the Article 32, Uniform Code of Military Justice, 10 USC § 832, hearing and which had been subjected at that time to extensive cross-examination by counsel for both accused. *Cf. United States v. Hubbard, supra; United States v. Connor*, 27 MJ 378 (CMA 1989); *see also Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d

[2] The Court of Military Review found that the convictions for attempted sodomy and assult with intent to commit sodomy were multiplicious and dismissed the latter specification. However, they affirmed the findings of guilty of committing indecent acts.

597 (1980). Absent any suppression of evidence by the prosecution, admissibility of the former testimony is unaffected by the circumstance that, during the pretrial investigation, defense counsel lacked information that would have been useful in cross-examining Courtney if he had testified at trial. *See United States v. Hubbard, supra.*

Appellate defense counsel also complain that the defense was not allowed to introduce extrinsic evidence that Courtney had stolen $247.00 from a fellow soldier at the time he absented himself without authority a few days before Spindle's trial. If Courtney had been present to testify, he could have been cross-examined about the larceny to the extent that the military judge, in his discretion, considered that this misconduct related to the witness' credibility. Generally, however, extrinsic evidence of a witness' misconduct – short of a conviction – is not received to impeach his credibility. *Cf.* Mil.R.Evid. 608(b); *United States v. Cottle,* 14 MJ 260, 265 (CMA 1982). An exception is made when the extrinsic evidence of misconduct tends to show that the witness has bias, prejudice, or a motive to misrepresent, Mil.R.Evid. 608(c); but we see no reason why that exception would apply in this case.

We observed in *Connor* that, if former testimony of an absent witness is received, the judge has discretion under the Military Rules of Evidence to allow introduction of an inconsistent statement made by the witness after he had given his testimony.[3] 27 MJ at 390-91. Perhaps some discretion exists for the judge to allow the reception of extrinsic evidence as to misconduct by an absent witness, if the military judge concludes that this is necessary in order for the factfinder properly to evaluate the witness' credibility. However, the judge certainly is not compelled to admit such evidence and thereby to propel the factfinder into a mini-trial of a collateral issue. *Cf. United States v. Cottle, supra* at 264. Thus, the military judge ruled properly in excluding the extrinsic evidence of Courtney's misconduct.

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[3] This result is different from that reached in *Mattox v. United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895).

Furthermore, as the court below observed, if there had been error in this ruling, it could not have prejudiced Spindle. There was a plethora of other evidence before the court members as to Courtney's truthfulness. We are convinced beyond a reasonable doubt that the court members' consideration of the extrinsic evidence of a larceny by Courtney would have had no effect on their determination that, in many respects, his former testimony at the Article 32 hearing was credible.

II

Spindle also maintains that the Government's evidence was insufficient to establish his guilt. In this trial, the Government offered virtually the same evidence offered in Hubbard's trial, plus damaging admissions by Spindle. Since we have upheld the sufficiency of the evidence as to Hubbard, *United States v. Hubbard*, 28 MJ at 33-34, it follows *a fortiori* that the evidence as to Spindle was sufficient.

III

The decision of the United States Army Court of Military Review is affirmed.

Judge COX concurs.

Judge SULLIVAN did not participate.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 51123/AR
CMR Dkt. No. 443294

UNITED STATES, APPELLEE,

v.

THOMAS W. SPINDLE (227-70-4281), APPELLANT

ORDER

On consideration of appellant's petition for reconsideration of the Opinion of the Court, 28 MJ 35 (CMA 1989), it is by the Court, this 9th day of May, 1989,

ORDERED:

That said petition is hereby denied.

Judge SULLIVAN did not participate.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

APPENDIX C

UNITED STATES ARMY COURT
OF MILITARY REVIEW
HQ, USA Western Command

CM 443294

UNITED STATES, APPELLEE,

v.

SPECIALIST FOUR (E-4), THOMAS W. SPINDLE,
SSN 227-70-4281, UNITED STATES ARMY, APPELLANT

MEMORANDUM OPINION

Before MARDEN, PAULEY and WERNER, Appellate Military Judges

G. C. Ryker, Military Judge

Captain Gunther O. Carrle, JAGC, argued the cause for the appellant. With him on the brief were Lieutenant Colonel William P. Heaston, JAGC, and Major Edwin D. Selby, JAGC.

Captain Patrick J. Cunningham, JAGC, argued the cause for the appellee. With him on the brief were Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, and Lieutenant Colonel Thomas M. Curtis, JAGC.

WERNER, Judge:

Contrary to his pleas, appellant was convicted of felony murder, attempted sodomy, assault with intent to commit sodomy, and indecent, lewd and lascivious acts with a child in violation of Articles 118, 80, and 134, Uniform Code of Military Justice. A court with members sentenced him to a dishonorable discharge, confinement at hard labor for life, forfeiture of $275.00 pay per month, and reduction to Private E-1. The convening authority approved the sentence.

Among the issues presented for resolution are: whether the evidence was insufficient to establish appellant's guilt; and whether appellant's constitutional right to confront the Government's primary witness was abridged by admission of that witness' former testimony at a pretrial hearing conducted pursuant to Article 32, Uniform Code of Military Justice. *See* Military Rule of Evidence 804(b)(1). On the basis of the evidence of record, we find the evidence legally and factually sufficient and the admission of the witness' former testimony proper. *See United States v. Hubbard*, 18 M.J. 678 (ACMR 1984).

Appellant also contends that the military judge erred by refusing to allow him to present evidence attacking the credibility of the Government's key witness. The witness, Private Courtney, had allegedly stolen $247.00 from a Specialist Stewart while visiting the latter's room. According to the defense's offer of proof, Specialist Stewart would testify that during his brief absence from the room Courtney took the money from a wallet left unattended on a dresser. It was the defense's position that this information was probative of Courtney's character for untruthfulness and that it should have been admitted because the defense did not have the opportunity to cross-examine Courtney. We disagree. As noted by the military judge in refusing to allow Stewart's testimony, specific instances of misconduct not amounting to a conviction of a crime may not be proved by extrinsic evidence where the purpose of its admission is to attack or support credibility of the witness. Military Rule of Evidence 608(b). *See also United States v. Gonzalez*, 16 M.J. 423 (CMA 1983); *United States v. Banker*, 15 M.J. 207 (CMA 1983); *United States v. Hunter*, 17 M.J. 738 (ACMR 1983). Although the military judge has discretion to allow inquiry into such matters on cross-examination where the proffered evidence is probative of the witness' character for truthfulness or untruthfulness or where it would tend to show his bias, prejudice or motive to misrepresent, neither of these conditions was shown in this case. *See* Military Rule of Evidence 608(c).

The burden of making such minimal showing of relevancy is upon the party proffering the evidence. *United States v. Hunter, supra.* Furthermore, considering the vast quantum of impeaching evidence against Courtney that had already been admitted, we fail to see how the absence of Stewart's testimony could have prejudiced appellant. *United States v. Banker, supra.*

Finally, we hold that on the facts of this case, the offenses of attempted sodomy and assault with intent to commit sodomy are multiplicious for findings because they are factually indistinguishable. *United States v. Gibson,* 11 M.J. 435 (CMA 1981). We will therefore dismiss the latter since it carries the lesser maximum punishment. Conversely, the evidence reveals that the indecent assault upon the child victim preceded the attempted sodomy and felony murder and was not part of a continuous course of misconduct that culminated in those more serious offenses. *See United States v. Baker,* 14 M.J. 361 (CMA 1983). The remaining assignments of error are without merit.

The finding of guilty of Specification 1 of Charge I is set aside and that specification is dismissed. The remaining findings of guilty and the sentence are affirmed.

Senior Judge MARDEN and Judge PAULEY concur.

FOR THE COURT:

/s/ Thaddeus J. Placzkouski
for WILLIAM S. FULTON, JR.
Clerk of Court

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Supreme Court, U.S.
FILED
AUG 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-25

In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS W. SPINDLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission at trial of the recorded and sworn testimony of an unavailable witness given at a preliminary hearing violated the Confrontation Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment.

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THOMAS W. SPINDLE, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-4a) is reported at 28 M.J. 35. The opinion of the Army Court of Military Review (Pet. App. 1c-3c) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 10, 1989. A petition for reconsideration was denied on May 9, 1989. The petition for a writ of certiorari was filed on July 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(c) (Supp. V 1987).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Shafter, Hawaii. He was convicted of assault with intent to commit sodomy, attempted sodomy, committing indecent acts with a male under the age of 16, and felony murder, in violation of Articles 80, 118, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 918, and 934.[1] He was sentenced to life imprisonment, a dishonorable discharge, forfeiture of part of his pay, and a reduction in rank. The convening authority approved the findings and sentence. The Army Court of Military Review dismissed the assault charge, affirmed the remaining findings, and affirmed the sentence. Upon discretionary review, the Court of Military Appeals affirmed.

1. On the evening of February 5, 1982, Derek Kusumoto and his 14-year old twin brother Dominic went to a bowling alley near their home at Schofield Barracks, Hawaii. Tr. 397. Derek left the bowling alley at about 8:30 p.m., telling his brother that they would meet at 9 p.m. at their home. Tr. 403-404. Dominic returned home; Derek did not. Tr. 379, 405. At 11 p.m., the boys' father, Lieutenant Colonel Kusumoto, reported to the military police that Derek was missing. Tr. 380. The following evening, at about 10:30 p.m., Colonel Kusumoto identified the dead body of his son Derek at the Tripler Army Medical Center in Hawaii. Tr. 381. See 89-26 Pet. App. 3a.

At about 5 p.m. on February 6, 1982, petitioner reported that he had found Derek's body. Tr. 577-578; GX

[1] Petitioner was convicted of crimes stemming from the same incident in which petitioner's confederate Clifford Hubbard was involved. Hubbard was separately tried, and his convictions (with one minor modification) were upheld on appeal. *United States* v. *Hubbard*, 18 M.J. 678 (A.C.M.R. 1984), aff'd, 28 M.J. 27 (C.M.A. 1989), petition for cert. pending, No. 89-26.

26. In a sworn statement, petitioner told Army Criminal Investigation Division (CID) agents that he found the body while he was photographing various sites at Schofield Barracks. *Ibid.* Petitioner was photographing an underground bomb shelter when he looked down the stairs of the structure. Tr. 577; GX 26. Using a flashlight, petitioner walked down the stairs and found the body. Petitioner described Derek's partially clothed body to investigators. He said that the boy was wearing white, knee-high socks with red and blue stripes. Tr. 564, 567. Military policemen, responding to petitioner's report, found Derek's body face down and naked from the waist down except for a pair of white socks. Tr. 435; GX 7. The socks were rolled down to Derek's ankles; the socks had red and yellow stripes, but the stripes were not visible. GXs 7, 30. See 89-26 Pet. App. 4a.[2]

Doctor Wong, a forensic pathologist, examined Derek's body. Dr. Wong found "abrasions and contusions present on, practically, every surface of the external surface of the body, including the head, the neck, chest, abdomen, the right and left upper extremities, the posterior surface of the chest and also * * * on the right and left knees." Tr. 501. Those abrasions and contusions, according to Dr.

---

[2] When later confronted with the photograph showing that Derek's socks were rolled down, petitioner stated, "I must have been there, I know the socks were up, I must have seen him when he was alive." Tr. 854. Petitioner then admitted that he was at the bunker on the evening of February 5, 1982, but he denied killing Derek. Tr. 855. Petitioner related that he had a dreamlike recollection of that evening and remembered seeing three "figures" near the bunker, hearing sounds like someone being raped, and seeing the "black guy [take] the little figure out into the bunker." Tr. 852. Asked why he did not help the boy, petitioner responded, "I couldn't, I knew he was dead." Tr. 855-856. Petitioner then said, "I want to take that back, I didn't mean to say that." Tr. 856.

Wong, were consistent with the boy having been forcibly moved "either up or down, following the longitudinal axis of the body." Tr. 512-513. Doctor Wong also found a bite mark on Derek's chest. Tr. 533. He determined that the cause of death was "asphyxia due to suffocation" caused by "an object or objects [being] applied to * * * the nose and mouth" for three to five minutes. Tr. 520, 521, 525. See 89-26 Pet. App. 5a.

Private First Class Joseph Courtney, who was with petitioner on the evening of February 5, 1982, implicated petitioner in Derek's death. Based on Courtney's statements and other evidence,[3] petitioner was charged with murdering Derek.

2. a. Article 32 of the UCMJ, 10 U.S.C. 832, provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charges. An Article 32 hearing is similar to a preliminary hearing conducted to determine probable cause to hold a defendant for trial. The accused has the right to be informed of the charges against him, to be present during the hearing, to be represented by counsel, to be informed of the witnesses that the prosecution expects to call, to be informed of the identity of his accuser, to cross-examine all available witnesses, and to present evidence in his defense. He may also present any evidence that would mitigate the severity of the offenses. A defendant has the right to have defense counsel appointed to assist him during the hearing. Art. 38, UCMJ, 10 U.S.C. 838 (1982 & Supp. V 1987); Rule for Courts-Martial 405(f) and (g), *Manual for Courts-Martial, United*

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[3] Investigators collected hair samples from Derek's clothing. A forensic serologist and hair analysis expert testified at trial that three of these hairs matched petitioner's head hair to an 80% certainty. Tr. 617-618, 621-622.

States—1984. Moreover, the convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. 834(a) (1982 & Supp. V 1987).

b. In this case, Private Courtney testified under oath during the Article 32 hearing. Petitioner and his appointed counsel were present during his testimony. Tr. 651. Private Clifford Hubbard, who was also accused of participating in Derek's murder, was present with his appointed counsel. *Ibid.* The verbatim transcript of Courtney's testimony during the hearing totalled 129 pages, Tr. 712-841, of which 43 pages consisted of defense counsels' cross-examination of Courtney. See Tr. 754-769, 825-828 (cross-examination by Hubbard's counsel); Tr. 769-782, 828-836 (cross examination by petitioner's counsel).

Private Courtney testifed twice at the hearing. Initially, Courtney denied being with petitioner and Hubbard on the evening of February 5, 1982. Tr. 715, 722-723. Courtney acknowledged that he had made a sworn statement to the Army CID that he was at the bunker with petitioner and Hubbard when Derek was murdered, Tr. 716-717, but he said that the statement was not true, Tr. 720. The Article 32 investigating officer warned Courtney about the possibility that he could be prosecuted for giving a false official statement and advised Courtney of his rights under Article 31(b), UCMJ, 10 U.S.C. 831(b). Tr. 723. Courtney indicated that he wanted to speak with a lawyer, Tr. 724, and he was given the opportunity to do so. The Article 32 hearing was then adjourned for two days. See 89-26 Pet. App. 5a-6a.

When the hearing resumed Courtney testified that on the evening of February 5, he, petitioner, and Hubbard met Derek outside a club for enlisted soldiers located near

the bowling alley where Derek and his brother had been. Tr. 728, 733. They asked Derek if he "wanted to go get high," and Derek said he did. Tr. 733-734. The group walked to a tree near the bunker and smoked marijuana for about ten minutes. Tr. 736-737. Petitioner and Hubbard then began wrestling with each other and "started pushing the kid around." Tr. 737. At one point, Hubbard sat on Derek's chest while petitioner pulled down Derek's pants. *Ibid.* Hubbard rolled Derek onto his stomach and petitioner held Derek down while Hubbard "started rectal intercourse." Tr. 738. When Derek tried to scream, petitioner put his hand over the boy's mouth. Tr. 739. When Courtney tried to intervene, Hubbard pushed him away and brandished a knife.[4] Tr. 740-741. Ultimately, Derek went into a "seizure," and stopped struggling. Tr. 747-748. Courtney pushed petitioner and Hubbard off Derek and checked Derek's pulse. Tr. 748. Finding none, Courtney said, "he's dead." *Ibid.* Thereafter, petitioner and Hubbard carried Derek's body three-quarters of the way down the bunker stairs and let it roll the rest of the way, while Courtney held a flashlight at the top of the stairs. Tr. 750-751. See Pet. App. 6a-7a.[5]

c. Before trial, Courtney left Hawaii for the mainland. Despite diligent efforts by the Army to locate Courtney, he was not found before the trial. See 89-26 Pet. App. 4d.[6]

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[4] Investigators found a buck knife, GX 25, near the bunker. Tr. 446-447. There were no identifiable fingerprints on the knife.

[5] Asked to explain why he earlier denied being with petitioner and Hubbard, Courtney said that he was afraid of them because "they can still get at me, sir." Tr. 822.

[6] Petitioner states that Courtney resurfaced after trial. Pet. 3. Courtney was found approximately four months after petitioner's trial and was discharged from the Army in November 1982. Petitioner never asked for a new trial in light of Courtney's subsequent availability.

At trial, the government moved, pursuant to Mil. R. Evid. 804(b)(1),[7] to admit Private Courtney's testimony at the Article 32 hearing as the testimony of an unavailable witness. Tr. 650. Petitioner objected, arguing that Courtney was not unavailable and that petitioner's counsel did not have a full opportunity to cross-examine Courtney at the hearing. Tr. 651. Petitioner alluded to laboratory reports and the autopsy report that had been prepared after Courtney testified, implying that he wanted to question Courtney about those reports. Tr. 685. The government established that Courtney was unavailable because he was absent without leave. The trial judge then admitted Courtney's Article 32 testimony, Tr. 686-687, noting that petitioner's counsel and Hubbard's counsel had "vigorously" cross-examined Courtney at the hearing. Tr. 685.

d. During trial, petitioner called Dr. Larry O'Neil, a dentist,[8] who had examined the bite marks on Derek's chest. Tr. 909. Dr. O'Neil testified that he found five to seven points of favorable comparison between petitioner's bite pattern and the chest bite mark. Tr. 928. He concluded, however, that the chest bite mark was not consistent with the bite pattern of petitioner, Hubbard, or Courtney. Tr. 911, 914.

3. The Army Court of Military Review affirmed. Pet. App. 1c-3c. It upheld the trial court's finding that Court-

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[7] Rule 804(b)(1) of the Military Rules of Evidence provides that the verbatim record of an Article 32 proceeding is admissible at trial if the declarant is unavailable. Accord Fed. R. Evid. 804(b)(1).

[8] Petitioner overstates Dr. O'Neil's qualifications by calling him a "forensic odontologist." Pet. 3. In fact, Dr. O'Neil was board certified in "general dentistry." Tr. 908. His training in forensic odontology consisted of a one-week course at the Armed Forces Institute of Pathology. Tr. 909, 924. Dr. O'Neil had never before testified about bite marks. Tr. 925.

ney's former testimony was admissible, citing its opinion in *United States* v. *Hubbard,* 18 M.J. 678 (A.C.M.R. 1984), aff'd, 28 M.J. 27 (C.M.A. 1989), petition for cert. pending, No. 88-26. Pet. App. 2c. In *Hubbard*, the same trial judge considered identical testimony offered under identical circumstances. The court of military review in *Hubbard* agreed with the trial court that Courtney was unavailable and found that Hubbard's cross-examination of Courtney was "thorough, lengthy and vigorous." *Hubbard*, 18 M.J. at 683 (89-26 Pet. App. 8d). The court in *Hubbard* therefore concluded that the admission of Courtney's pretrial testimony did not violate the Confrontation Clause. *Ibid.* (89-26 Pet. App. 8d).

4. The Court of Military Appeals affirmed. Pet. App. 1a-4a. The court found that Courtney was unavailable to testify at trial and concluded that the admission at trial of his testimony at the pretrial hearing did not violate the Confrontation Clause. The court observed that Courtney's testimony was subjected to "extensive cross-examination by counsel for both accused." *Id.* at 2a. Responding to petitioner's argument that his cross-examination of Courtney was hindered by the unavailability of Dr. O'Neil's bite mark evidence, the court noted that "[a]bsent any suppression of evidence by the prosecution, admissibility of the former testimony is unaffected." *Id.* at 3a.[9] In so ruling, the court relied on its opinion in *United States* v. *Hubbard*, 28 M.J. 27 (C.M.A. 1989), in which the court emphasized that the " 'Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to

[9] In *Hubbard*, the court discussed the confrontation issue at greater length and specifically found that the prosecution "did not hold back from the defense" but "promptly" provided the defense all evidence as it became available. 89-26 Pet. App. 10a.

whatever extent, the defense might wish.' " 28 M.J. at 33 n.5 (89-26 Pet. App. 11a n.5), quoting *Delaware* v. *Fensterer,* 474 U.S. 15, 20 (1985).

ARGUMENT

1. Petitioner contends (Pet. 8-13) that the admission of Courtney's testimony at the Article 32 hearing violated the Confrontation Clause of the Sixth Amendment. Petitioner's claim, however, is quite narrow. Petitioner does not deny that Courtney was unavailable to testify at trial; he does not dispute that Courtney's testimony at the Article 32 hearing was admissible under the former testimony exception to the hearsay rule; and he does not claim that the presiding officer at the pretrial hearing improperly limited his cross-examination of Courtney in any way. Instead, petitioner claims that Courtney's testimony was inadmissible since petitioner was unable effectively to cross-examine Courtney, because the defense was unaware at that hearing that bite marks had been found on Derek's body. Petitioner relies on this Court's decision in *Pennsylvania* v. *Ritchie,* 480 U.S. 39 (1987), and in particular on Justice Blackmun's concurring opinion in that case.

In *Ritchie*, the defendant was charged with sexually abusing his daughter, and the defense sought access to records compiled by a state child welfare agency regarding their investigation of that incident, as well as a report that the defendant's children has been sexually abused on a prior occasion. When the request was denied, the defendant claimed that his confrontation rights had been violated. A plurality of this Court rejected that contention, holding that a defendant can establish a Confrontation Clause violation "only where there was a specific statutory or court-imposed restriction at trial on the scope of questioning." 480 U.S. at 53-54. See *id.* at 53 n.9

("[T]he Confrontation Clause only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial."). Thus, the plurality held that the Confrontation Clause was not violated where defense counsel was permitted fully to cross-examine the witness, but was not able to use unavailable records in that cross-examination. *Id.* at 54. The plurality stated that the proper analysis under those circumstances is to determine whether denying the defense access to the records violated the Due Process Clause under *Brady* v. *Maryland,* 373 U.S. 83 (1963). 480 U.S. at 53 n.9, 56-58. The plurality also distinguished *Davis* v. *Alaska,* 415 U.S. 308 (1974), in which the Court held that the Confrontation Clause was violated when the defense was not allowed to impeach the critical prosecution witness with the fact that he was on juvenile probation and therefore might have been "cooperating" with the State. The error in that case, in the view of the plurality, was in the fact that the defense was denied any opportunity to use that evidence at trial, not in the fact that the witness's juvenile record was confidential. 480 U.S. at 54. Justice Blackmun concurred in the judgment. He concluded that, under *Davis*, the denial of access to material information could violate the Confrontation Clause if, for example, it prevented the defense from demonstrating that the witness was biased toward the prosecution or had made prior inconsistent statements. *Id.* at 65 (opinion of Blackmun, J.).

This case is materially different from *Ritchie* (and *Davis*) because the evidence regarding the bite marks on Derek's body was available to the defense at trial, and because the unavailability of the evidence at the preliminary hearing did not significantly undermine the effectiveness of the cross-examination of Courtney. The availability of the bite mark evidence at trial, together with

petitioner's (and Hubbard's) unlimited cross-examination of Courtney at the Article 32 hearing, gave petitioner a full opportunity to challenge the accuracy of Courtney's perception and recollection of the circumstances of Derek's death. Courtney unequivocally testified that only he, petitioner, and Hubbard were together with Derek on the night in question, and that petitioner and Hubbard murdered Derek. Dr. O'Neil testified that, in his opinion, the bite mark was not inflicted by Courtney, Hubbard, or petitioner. Petitioner was therefore able to use Dr. O'Neil's testimony to impeach Courtney's account of the crime by suggesting that a fourth person was present at the scene of the crime and was the true culprit. To be sure, petitioner was not able to question Courtney about the bite mark evidence because the autopsy report had not yet been prepared when Courtney testified at the Article 32 hearing.[10] But that would also have been true with regard to any other type of out-of-court statement from a non-testifying declarant, such as an excited utterance or a co-conspirator's declaration. In each case, the declarant could not be cross-examined about the bite mark. Indeed, in light of the extensive cross-examination of Courtney undertaken by the defense at the Article 32 hearing, the only advantage to the defense from having known about the bite mark at that hearing would have been the possibility that Courtney would have recanted his testimony when confronted with that evidence. That possibility, however, is sufficiently remote that it can be

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[10] In *Arizona* v. *Youngblood,* 109 S. Ct. 333, 337 (1988), the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Petitioner concedes that the unavailability of the bite mark evidence at the Article 32 hearing was not due to bad faith by the government, Pet. 9 n.4, and in any event petitioner used the bite mark evidence at trial.

discounted. Petitioner's inability to question Courtney about the bite mark therefore did not deny petitioner the opportunity fairly to challenge Courtney's testimony. Cf. *Arizona* v. *Youngblood,* 109 S. Ct. 333, 338 (1988) (Stevens, J., concurring) (the jury's rejection of a permissive inference that the test of semen samples that had not been properly preserved by the prosecution would have been exculpatory demonstrated that the unavailable test result was immaterial).

This case therefore is governed by the general rule that the Confrontation Clause guarantees a defendant only the opportunity for an effective cross-examination. *Delaware* v. *Fensterer,* 474 U.S. at 20. That rule applies even though the evidence introduced at trial consisted of the former testimony of Courtney. In *Ohio* v. *Roberts,* 448 U.S. 56, 73 n.12 (1980), this Court expressly rejected the suggestion that a trial court must determine "whether defense counsel's questioning at the preliminary hearing surmounts some inevitably nebulous threshold of 'effectiveness' " before the preliminary hearing testimony of an unavailable witness may be admitted at trial. As the Court stated, *ibid.*:

> We hold that in all but such extraordinary cases [*i.e.*, cases in which defense counsel has been found to have been constitutionally ineffective], no inquiry into "effectiveness" is required. A holding that every case involving prior testimony requires such an inquiry would frustrate the principal objective of generally validating the prior-testimony exception in the first place—increasing certainty and consistency in the application of the Confrontation Clause.

2. Petitioner also contends (Pet. 10-12) that the admission of Courtney's pretrial testimony violated the Due Process Clause because the testimony was unreliable. The

Court of Military Appeals, however, was correct in ruling that it was unnecessary to make an independent inquiry into the reliability of Courtney's Article 32 testimony once that testimony was found admissible under the former testimony exception to the hearsay rule. In *Bourjaily* v. *United States,* 483 U.S. 171, 182-183 (1987), the Court made clear that "*Roberts* itself limits the requirement that a court make a separate inquiry into the reliability of an out-of-court statement. * * * [N]o independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.' " The exception for former testimony is just such an exception. See *Mattox* v. *United States,* 156 U.S. 237 (1895) (testimony given at a prior trial); *California* v. *Green,* 399 U.S. 149 (1970) (testimony given at a preliminary hearing); *Ohio* v. *Roberts, supra* (same).

Preliminary hearing testimony is admitted without a separate inquiry into its reliability because it is "given under circumstances closely approximating those that surround the typical trial." *California* v. *Green,* 399 U.S. at 165. This case illustrates that principle. The charges against petitioner were the same at the Article 32 hearing as at trial. Courtney was under oath during his testimony at the proceeding. Petitioner was present at the hearing, and he was represented by the same counsel who represented him at trial. And not only did petitioner have the opportunity to cross-examine Courtney at the hearing, but he took full advantage of that opportunity, asking a total of 236 questions that probed Courtney's sincerity and the consistency and accuracy of his perception and recollection. Petitioner also profited from the cross-examination of Courtney conducted by counsel for co-defendant Hubbard, who asked Courtney an additional 192 questions. Given these safeguards against the

possibility that Courtney's Article 32 testimony was unreliable, the courts below did not err in concluding that Courtney's prior testimony could be admitted at trial even though Courtney was unavailable at that time for cross-examination.[11]

The case on which petitioner principally relies, *Lee* v. *Illinois,* 476 U.S. 530 (1986), is inapposite. *Lee* involved the admission of a confession made by an accomplice to the crime who was not subject at any time to cross-examination by the accused. Courtney was not shown to be an accomplice,[12] but even if he had been, his Article 32 testimony was not a "presumptively unreliable" custodial confession that fell outside any exception to the hearsay rule. See *Lee*, 476 U.S. at 541. This case is therefore not governed by the decision in *Lee.*

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[11] In any event, even if the trial court was required to determine whether Courtney's testimony was reliable, petitioner's own statements provided powerful corroboration of that testimony. See page 3 & note 2, *supra.* The manner of death (asphyxiation) and the physical evidence (hairs, knife) also corroborated Courtney's testimony. In the companion case, *Hubbard*, the Court of Military Appeals found that Courtney's testimony "was extensively corroborated by physical evidence and by the testimony of other witnesses." 89-26 Pet. App. 12a.

[12] There was no evidence that Courtney participated in any way in Derek's murder. Indeed, Courtney testified that he tried to help Derek. Tr. 740-742; 89-26 Pet. App. 6a-7a. The trial judge gave an accomplice instruction nonetheless, Tr. 1038, reasoning that the jury might believe Courtney was "criminally involved in the venture." Tr. 989. The Court of Military Appeals expressed doubt whether Courtney was an accomplice, but found (in the *Hubbard* case) that his testimony was sufficiently corroborated even if Courtney was an accomplice. 89-26 Pet. App. 13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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